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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

FRANK TREVINO, Plaintiff and Respondent, v. LION RAISINS, INC., Defendant and Appellant.	F078016 (Super. Ct. No. 18CECG01487) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Law Offices of Brian C. Leighton, Brian C. Leighton, and Bertram T. Kaufman, for Defendant and Appellant.

Todd B. Barsotti for Plaintiff and Respondent.

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[*] Before Detjen, Acting P.J., Franson, J. and DeSantos, J.

Plaintiff Frank Trevino sued his employer, Lion Raisins, Inc. (Lion Raisins) for age and disability discrimination. Lion Raisins responded by filing a petition to compel arbitration. The parties presented conflicting evidence as to whether the revised employee handbook containing the arbitration provisions was delivered to Trevino. The trial court denied the petition on the ground Lion Raisins failed to prove the parties formed an agreement to arbitrate. Lion Raisins appealed.

We reach the following conclusions. First, the trial court correctly allocated the burden of proof to Lion Raisins to show the existence of a valid arbitration agreement. Second, when a trial court determines the party with the burden of proof failed to carry that burden, " 'the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law.' " (*Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057, 1074.)[1] Third, under the finding-compelled-as-a-matter-of-law standard, the finding advocated by the appellant is required only if " 'the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." [Citation.]' " (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838.) Fourth, based on our review of the evidence presented in this case, Trevino's declaration contradicted Lion Raisins's circumstantial evidence about the delivery of the revised employee handbook. Consequently, the trial court's determination that Lion Raisins failed to carry its burden of proof must be upheld under the applicable standard of review.

We therefore affirm the order denying the motion to compel arbitration.

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1 " '[I]t is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment.' " (*Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 965.)

FACTS

In November 2015, Trevino was hired by Lion Raisins as a nonseasonal employee. During most of his employment, Trevino worked as a lead diesel mechanic. Effective December 21, 2016, Lion Raisins distributed a revised version of the employee handbook to its nonseasonal employees. Lion Raisins's human resource manager, Eric Vollmer, oversaw the distribution of the December 21, 2016 revision of the employee handbook.

In July 2017, Trevino underwent surgery to repair a hernia. In October 2017, after returning to work, Trevino was demoted. In November 2017, Trevino underwent back surgery and was prescribed a period of convalescence. In early February 2018, during this period of convalescence, Trevino's employment was terminated. At the time of the termination, Trevino was 59 years old and earning wages of approximately $22.00 per hour. Trevino contends he was told he was being " 'let go' " due to a " 'slow season.' " Trevino contends this explanation was a pretext because Lion Raisins took out an advertisement seeking a diesel mechanic the day after his termination.

In April 2018, Trevino filed a claim with the Department of Fair Employment and Housing. Later that month, he received a right to sue notice.

PROCEEDINGS

In April 2018, Trevino filed a complaint for damages, alleging discrimination based on a disability, unlawful retaliation, failure to accommodate a perceived disability, age discrimination, and failure to prevent discrimination. In June 2018, Lion Raisins responded to the complaint by filing a petition to compel arbitration and to stay the action pending arbitration.

Lion Raisins supported its petition to compel with Vollmer's declaration and a declaration of its attorney, stating the demand for arbitration presented to Trevino's counsel had been refused. Vollmer's declaration stated: "Trevino was employed by Lion Raisins as a non-seasonal employee when the December 21, 2016 revision of the Employee Handbook was distributed, and a copy of such revisions of the Employee

Handbook *would have been distributed to him*." (Italics added.) Vollmer's declaration included as an exhibit a copy of the relevant provisions of the revised employee handbook. Section 2:2 of the revised employee handbook sets forth mandatory arbitration provisions. The text of that provision is not quoted here because (1) it is not disputed that the language is broad enough to cover Trevino's claims and (2) the text itself is not relevant to the question whether an agreement to arbitrate was formed.

Trevino opposed the petition to compel arbitration, claiming he did not consent to arbitration. His opposition noted the signature page from the handbook, which included an acknowledgement of receipt, was not included in the excerpt provided by Lion Raisins. Trevino argued Lion Raisins purposefully omitted the page because no signature had been obtained from him. In Trevino's view, the little evidence provided did not meet Lion Raisins's burden of proving by a preponderance of the evidence that an agreement to arbitrate existed.

Trevino's declaration stated that at no time in December 2016 or thereafter did he receive the revisions to the employee handbook described in Vollmer's declaration. His declaration also stated he did not receive and was not made aware of an arbitration agreement and he did not sign an acknowledgement of receipt for the revised employee handbook.

Lion Raisins's reply to Trevino's opposition asserted Trevino was bound by the arbitration clause in the employee handbook because he continued to work for Lion Raisins after the handbook was distributed. Lion Raisins also argued Trevino was bound by the arbitration provision in the handbook even if he failed to read it and, under applicable law, Lion Raisins was allowed to unilaterally revise the policies in its employee handbook.

Prior to the hearing on the petition to compel arbitration, the trial court issued a tentative ruling stating it intended to deny the petition. A hearing was held on August 9, 2018. No testimony or other evidence was presented at the hearing. Consequently, the

petition was decided based on the declarations and other papers submitted by the parties. At the hearing, the court stated Vollmer's declaration only asserted the revised employee handbook " 'would have been given' " to Trevino, not that it actually was distributed to him. After hearing arguments from counsel, the court adopted its tentative ruling. Lion Raisins filed a timely appeal.

DISCUSSION

I. FORMATION OF AN AGREEMENT TO ARBITRATE

A. Legal Principles

Section 2 of the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) provides in relevant part: "A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) Despite the liberal federal policy favoring arbitration agreements, "it is a cardinal principle that arbitration under the FAA 'is a matter of consent, not coercion.' " (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).) Therefore, a party cannot be forced to submit to arbitration any dispute that he has not agreed to arbitrate. (*Ibid.*)

"In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle, supra,* 55 Cal.4th at p. 236.) Stated another way, the existence of a valid agreement to arbitrate is determined by reference to state law principles concerning the formation and enforceability of contracts. (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 59; *Bolter v. Superior Court* (2001) 87 Cal.App.4th 900, 906.) It is well established that arbitration agreements must

be in writing, but need not be signed because a party's acceptance may be implied in fact. (*Pinnacle*, at p. 236.)

The party seeking to compel arbitration "bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972; see Evid. Code, § 115 [burden of proof].) In contrast, "the party opposing arbitration bears the burden of proving any defense, such as unconscionability." (*Pinnacle*, *supra*, 55 Cal.4th at p. 236.)

A party seeking to prove an arbitration agreement was formed must establish the essential elements of a contract—specifically, (1) parties capable of contracting, (2) the consent of those parties, (3) a lawful object, and (4) adequate consideration. (Civ. Code, § 1550.) In this appeal, the dispute relates to the consent of the parties, which must be (1) free, (2) mutual, and (3) communicated by each to the other. (Civ. Code, § 1565.)

B. Standard of Review

Generally, when an order denying a petition to compel arbitration is based on the trial court's resolution of disputed issues of fact, the court's factual findings are subject to review under the substantial evidence standard. (*Performance Team Freight Systems, Inc. v. Aleman* (2015) 241 Cal.App.4th 1233, 1239.) Where, as here, the trier of fact has determined the party with the burden of proof did not carry that burden, " 'it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment.' " (*Valero v. Board of Retirement of Tulare County Employees' Assn.*, *supra*, 205 Cal.App.4th at p. 965.) Instead, the question for the reviewing court is " 'whether the evidence compels a finding in favor of the appellant as a matter of law.' " (*Vieira Enterprises, Inc. v. McCoy*, *supra*, 8 Cal.App.5th at p. 1074.) "Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' " (*In re I.W.* (2009) 180

Cal.App.4th 1517, 1528; see *Dreyer's Grand Ice Cream, Inc. v. County of Kern*, *supra*, 218 Cal.App.4th at p. 838.) Accordingly, we conclude the finding-compelled-as-a-matter-of-law standard applies to the trial court's determination that Lion Raisins failed to carry its burden of proof. (See *Juen v. Alain Pinel Realtors, Inc.* (2019) 32 Cal.App. 5th 972, 981 [applying standard in the context of a motion to compel arbitration; trial court's denial of motion affirmed].)

C. Application of Standard to Lion Raisins's Evidence

Here, the evidence presented by Lion Raisins does not compel a finding of fact that the revised employee handbook with its mandatory arbitration provision actually was delivered to Trevino prior to the termination of his employment. Vollmer's declaration merely states that Trevino was a nonseasonal employee when the revisions to the employee handbook were distributed and "a copy of such revisions of the Employee Handbook would have been distributed to him." While the trial court might have inferred from this circumstantial evidence that the revised employee handbook was delivered to Trevino, we cannot conclude that inference was compelled because, among other things, statements in Trevino's declaration contradict that inference. Accordingly, Lion Raisins's evidence was not uncontradicted and of such character and weight as to leave no room for a judicial determination that it was insufficient to support a finding that Trevino actually received the revised employee handbook. Our conclusion that a finding of actual receipt was not compelled provides a sufficient ground for upholding the trial court's denial of the motion to compel arbitration and, therefore, we do not reach the other issues raised by Lion Raisins.

DISPOSITION

The August 9, 2018 order denying the motion to compel arbitration is affirmed. Trevino shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a).)